United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL 7477

76-~~7343~~

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P/S

United States Court of Appeals

For the Second Circuit.

CLARENCE O. GOKAY, JR., an infant, by his mother, DOROTHY GOKAY, Individually,

Plaintiffs-Appellants,

against

MARC ANTHONY'S INC., d/b/a MARC ANTONIO'S RESTAURANT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX.

LIPSIG, NAPOLI, SULLIVAN, MOLLEN & LIAPAKIS, P. C.
Attorneys for Plaintiffs-Appellants
100 Church Street
New York, N. Y. 10007

BOWER & GARDNER
Attorneys for Defendant-Appellee
415 Madison Avenue
New York, N. Y. 10017

FILED OCT 20 1976

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1976

(9981)

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

- -X

CLARENCE O. GOKAY, JR., an infant, by his mother, DOROTHY GOKAY, Individually,

Plaintiffs-Appellants,

-against-

MARC ANTHONY'S INC., d/b/a Marc Antonio's Restaurant,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

- -X

RELEVANT DOCKET ENTRIES.

Date	Proceedings
1976	
5-20	trial cont'd
5-24	trial cont'd and concluded. Jury verdict for pltff. in the sum of $150,000.
6-10	Filed Judgment #76,548-- that the pltffs. Clarence O. Gokay Jr. an infant by his mother Dorothy Gokay individually, recover of the deft. the sum of One hundred fifty thousand ($150,000.00) dollars and costs to be taxed. CONNER, J. Judgment entered 6-11-76 Clerk (m/n)
6-22	Filed Bill of Costs as taxed in the sum of $2,568.56, in favor of pltff, as against defts., and docketed as Judgment #76,548

RELEVANT DOCKET ENTRIES

Date	Proceedings
1976	
7-14	Filed deft's notice of appeal to the USCA from the Judgment entered on 6-11-76. Copy to: Harry H. Lipsig
7-16	Filed transcript of record of proceedings dated 5-18, 19, 20-76
8-9	Filed pltffs. affidavit of Joseph P. Napoli in support of motion for summary judgment, etc.
8-9	Filed pltffs. trial memorandum of law.
8-9	Filed pltffs. memorandum of law.
8-10	Filed notice that the record on appeal has been certified and transmitted to the USCA this date.
8-25	Filed Defts Affidavit and Notice of Motion for an order pursuant to Rule 4(a) FRAP approving *nunc pro tunc* the filing of deft's notice on appeal on 7-14-76 from the judgment entered on 7-14-76 upon jury's verdict in favor of pltff in t[illegible]um of $150,000.00 RET: AUGUST 27th, 1976.
8-27	Filed [illegible]tff's Affidavit in opposition to deft's motion to extend their time to file a Notice of Appeal. by Joseph P. Napoli.
8-27	Filed Deft's Affidavit in support of deft's motion for an Order of the FRAP approving *nunc pro tunc* the filing of deft's notice of appeal on 7-14-76 from judgment entered on 7-11-76 and in reply to the affidavit of Joseph P. Napoli submitted in opposition thereto. by Thomas R. Newman.
8-27	Filed Memo Endorsed (on Notice of Motion filed 8-25-76).....Motion granted, in the interests of justice. So Ordered. CONNER, J m-n
8-30	Filed deft-appellant's Affidavit in support of deft's motion for an order approving *nunc pro tunc* the filing of deft's notice of appeal on 7-14-76 from judgment entered on 7-11-76 and in reply to affidavit of Joseph P. Napoli submitted in opposition thereto by Thomas R. Newman.

AFFIDAVIT OF DANIEL E. SIFF IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

CLARENCE O. GOKAY, JR., an infant, etc.,

Plaintiff,

-against-

MARC ANTHONY'S INC., etc.,

Defendant.

----------X

74 CIV. 4577 (WCC)

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

DANIEL E. SIFF, Esq., being duly sworn, deposes and says: that I am a member of the firm of BOWER & GARDNER, Esqs., attorneys for the defendant-appellant and its Managing Partner. I am personally familiar with the facts and circumstances recited below, having prepared the Notice of Appeal herein.

I submit this Affidavit in support of defendant's motion pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure for an Order approving nunc pro tunc the filing of defendant's Notice of Appeal on July 14, 1976 from the judgment entered on June 11, 1976, upon the jury's verdict in favor of the plaintiff in the sum of $150,000.

AFFIDAVIT OF DANIEL E. SIFF IN SUPPORT OF MOTION

This application has become necessary because during the course of a pre-argument conference before Nathaniel Fensterstock, Staff Counsel for the United States Court of Appeals for the Second Circuit, held on August 19, 1976, it was first discovered by defendant's counsel that although the Notice of Appeal was timely served on July 2, 1976, it was not filed with the Clerk of the District Court within thirty days from the date of entry of the judgment, but rather, on the 33rd day.

We were totally unaware of this technical defect in our Appeal, having proceeded diligently with the Appeal from the first. Thus, heretofore, we complied with the Circuit Court's Civil Appeal Scheduling Order which required the Record on Appeal to be filed on or before August 13, 1976. In addition, we have already prepared and had finally printed (ready for filing) the appellant's brief, a copy of which is attached hereto. The joint appendix is presently at The Reporter Company, 11 Park Place, New York, New York and I have been advised that it will be printed and ready for filing next week.

In other words, the Appeal herein has been and is proceeding according to the schedule set by the Circuit Court and there can be no prejudice to the plaintiff if this Court grants defendant's motion to approve nunc pro tunc the filing of its Notice of Appeal on July 14, 1976.

AFFIDAVIT OF DANIEL E. SIFF IN SUPPORT OF MOTION

The inadvertent failure to file the Notice of Appeal with the Clerk of the District Court prior to the 33rd day after entry of judgment arose because of the following unusual circumstances.

At the time the Notice of Appeal was prepared, the law firm of BOWER & GARDNER was in the midst of a move of its quarters on the fourth floor of 415 Madison Avenue, New York, New York, to new offices on the seventh and eighth floors of the same building. The move, involving more than 90 of the firm's personnel, including myself and my secretary was scheduled to be made during the week of July 5, 1976.

The Notice of Appeal herein was prepared and served upon plaintiff's counsel on Friday, July 2, 1976. It was intended that the Notice of Appeal would be taken to the District Court and filed on the following Tuesday, when the office reopened after the Fourth of July Holiday weekend.

On Tuesday, Wednesday and Thursday, July 6th - 8th, the movers came in, packing more than 200 cartons of files that were scheduled to be moved from the fourth floor to the completed eighth floor installation. The actual move of personnel, files, library and office equipment was carried out on Friday, Saturday and Sunday, July 9th - 11th.

AFFIDAVIT OF DANIEL E. SIFF IN SUPPORT OF MOTION

Not until we completed unpacking on July 13th did I discover that the original Notice of Appeal with Affidavits of Service had inadvertently been packed up during the move and had not been filed with the District Court prior to July 11th as per my instructions. I immediately caused the Notice of Appeal to be filed.

It is respectfully submitted that "we have progressed a great distance from the time when failure to dot an i or cross a t made legal proceedings invalid." (Application of Mullen, 179 Misc. 144, 37 N.Y.S.2d 974, 976-977). In the interest of justice, defendant should not be deprived of the right to prosecute its appeal from the $150,000 judgment entered against it because of the inadvertent failure to file the Notice of Appeal arising out of the circumstances described above when plaintiff has in no way been prejudiced thereby and the prosecution of the Appeal not delayed or impeded.

That defendant has a most meritorious appeal is disclosed by its brief, a copy of which is attached hereto and made a part hereof.

In Compania De Nav. Trans. v. Georgia Hardwood Lum. Co., 141 F.2d 652 (5th Cir. 1944), where the Court validated nunc pro tunc a defective appeal, it was written:

> "We agree with appellant. It is quite plain that it was endeavoring to appeal. That the judge and everyone else concerned thought it was effectively appealing, the record leaves in no doubt, and but for the language of the opinion in the Alaska case, which, though not directly in point, is disturbing, we should not hesitate to hold: that what appellant did amounted to a timely application to appeal; that it was granted; that the appeal was perfected; and that our jurisdiction became established. It is quite clear that it does not at all advance the cause or the appearance of justice to deny to what appellant did the legal effect it was designed to achieve." (emphasis added).

The procedure that we are asking this Court to adopt is precisely that first approved in Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084 (3rd Cir. 1972) where it was held that if a Notice of Appeal is filed more than thirty but less than sixty days after entry of the judgment appealed from, the District Court may at any time consider a motion to validate the filing within the second thirty days for excusable neglect. On remand, the trial Court in the Torockio case validated a filing within the second thirty days (56 FRD 82, aff'd. 474 F.2d 1340 (3rd Cir. 1973).

The same procedure was followed by the United States Court of Appeals for the Second Circuit in Stirling v. Chemical Bank, 511 F.2d 1030, 1032-1033 (2nd Cir. 1975), where the Court held:

> "Here, however, the filing of the notice of appeal within 60 days, coupled with a prima facie showing of excusable neglect, and the timely service of the notice of appeal on the opposing parties, constituted a sufficient manifestation on the part of the appellants to

> permit the district court, in the exercise of its discretion, to treat the notice of appeal as the substantial equivalent of a motion to extend the time because of excusable neglect. See Evans v. Jones, 366 F.2d 772 (4th Cir. 1966); Reed v. People of State of Michigan, 398 F.2d 800 (6th Cir. 1968). Nothing in Rule 4(a) precludes the district court, more than 60 days after entry of judgment, from granting an extension of time to sanction the late filing of a notice of appeal within the second half of the 60-day period, provided a purported notice of appeal has actually been filed within that period." (cit. omitted).
>
> "Although we thoroughly disapprove of the careless procedure followed by appellants' counsel, who demonstrated a singular disregard for or ignorance of the pertinent rules, we will remand the case, in view of the showing made, to the district court for the purpose of determining whether there was excusable neglect entitling appellants, in the district court's discretion, to an extention of time nunc pro tunc to December 19, 1974, for the filing of their notices of appeal. If the district court should so find, the notice filed on that date will be deemed valid as to all appellants except Union Planters National Bank. Otherwise the appeals in 72 Civ. 4476 must be dismissed."

We submit that as a matter of general policy, disposition of controversies on the merit is favored and that the principle to be applied in this situation is that stated in Allen v. Fink, 211 App. Div. 411, 415:

> "The law is not inexorable in all its judgments. The policy of the courts is to be humane, and not unduly harsh and punitive in its treatment of suitors and attorneys who have made mistakes, and to look with tolerance upon errors and defects in pleading and practice, if they may be rectified without affecting substantial rights of litigants."

AFFIDAVIT OF DANIEL E. SIFF IN SUPPORT OF MOTION

WHEREFORE, it is respectfully requested that defendant's motion to approve nunc pro tunc the filing of its Notice of Appeal on July 14, 1976, be granted.

Sworn to before me, this
20 day of August, 1976.

DANIEL E. SIFF

[redacted]

AFFIDAVIT OF JOSEPH P. NAPOLI IN OPPOSITION TO MOTION.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

CLARENCE O. GOKAY, JR., an infant, etc., AFFIDAVIT

74 Civ. 4577 (WCC)

Plaintiff,

-against-

MARC ANTHONY'S INC., etc.,

Defendant.

----------x

JOSEPH P. NAPOLI, being duly sworn, deposes and says:

I am a member of the firm of LIPSIG, NAPOLI, SULLIVAN, MOLLEN & LIAPAKIS, P.C., and make this affidavit in opposition to defendant's motion to extend their time to file a Notice of Appeal.

The basis of the motion, which was not officially made and served until August 25, 1976, is that the defendant failed to timely file said Notice of Appeal and moved to file said Notice of Appeal based on an "excusable neglect" and a purported meritorious appeal.

NO EXCUSABLE NEGLECT

Defendant alleges in the affidavit in support of the within motion that it was on August 19, 1976 when it first discovered that the Notice of Appeal was not timely filed. Unfortunately, this is not correct since your deponent, prior to August 19, on or about August 17, 1976, telephoned the office of the attorneys for the defendants and told one of its attorneys of the defect. A motion was not made at that time but was only made after a conference before Mr. Fensterstock. The failure to make the motion

AFFIDAVIT OF JOSEPH P. NAPOLI IN OPPOSITION TO MOTION

prior to the conference before Mr. Fensterstock is important in that Mr. Fensterstock, after hearing the merits of the appeal, made recommendations with respect to the defendant withdrawing the appeal and paying a substantial part of the judgment.

The explanation of "excusable neglect" is somewhat sketchy. We are told that a Notice of Appeal was prepared by an attorney on July 2, 1976 and that someone was instructed to file them in the Federal District Court. We are not told who the person was who was instructed to file the Notice of Appeal and why that person did not file the Notice of Appeal.

There is also no explanation why, having discovered on July 13 that the Notice of Appeal was being filed late, that no motion was made at that time by any of the attorneys handling the case and the appeal.

Defendants have only explained why the motion for late filing was not made on July 13 when it was discovered the Notice of Appeal was inadvertently packed. They have not explained why the motion was not made on August 17 when they were directly told of the late filing and why they waited until after Mr. Fensterstock's conference and recommendation to make this motion.

Judge Weinfeld, in denying a motion to file a late Notice of Appeal, stated in Linabary v. Maritime Overseas Corporation 376 F Supp. 688 (S. D. N. Y. 1973) that "...in short, tactical moves do not constitute excusable neglect".

NO MERITORIOUS APPEAL

Defendant argues that they have a meritorious appeal as disclosed by its brief. To the contrary, a reading of the brief demonstrates that the issues decided by this court were properly

questions of fact for the jury and that the charge, which was not excepted to, properly presented the law to the jury as to definition of employee, and the application of the child labor law.

LATE FILING JURISDICTIONAL

A reading of the cases with respect to making a motion to file a late Notice of Appeal after 60 days from the filing of the judgment appealed from demonstrates that there is a definite conflict within the Circuit Courts as to whether same is permissable (see Moores Federal Practice, Volume 9, Section 204.13 [2]). Although the Court of Appeals Second Circuit permits such a motion, this issue has not been decided by the Supreme Court of the United States. In addition, although the Second Circuit permits such a motion, Stirling v. Chemical Bank, 511 F 2d 1030 (2d Cir. 1975) it still requires a sufficient "excusable neglect" explanation.

Defendant's "excusable neglect" explanation is insufficient to support the within motion. A reading of the Advisory Committee's note to the 1966 amendments to former rule 73A indicates that "no reason other than failure to learn of the entry of judgment should ordinarily excuse a party" (see Moores Federal Practice, Volume 9, Section 203.25 [3]). Although the Advisory Committee note also speaks of "extraordinary cases wherein justice would otherwise result" the excuse given in the case at bar does not fall within the intent of the legislation (see Moores Federal Practice, Volume 9, Section 204.13 [1] Page 973).

AFFIDAVIT OF JOSEPH P. NAPOLI IN OPPOSITION TO MOTION
DEFENDANT GUILTY OF LACHES

Although defendant indicates that it discovered the inadvertent packing of the Notice of Appeal on July 13, 1976, he did not move to file a late Notice of Appeal until after the conference with Mr. Fensterstock and until August 25, 1976. The Court of Appeals, Second Circuit in Lowry v. Long Island R. A, 370 F 2d 911 (2d Cir. 1966) held that delay in requesting an extension may itself justify the District Court in refusing it.

WHEREFORE, your deponent respectfully requests that the within motion be denied upon the grounds that there has been no showing of excusable neglect and on the further grounds that defendant does not have a meritorious appeal.

Dated: New York, New York
August , 1976

JOSEPH P. NAPOLI

Sworn to Before me this
day of August, 1976.

REPLY AFFIDAVIT OF THOMAS R. NEWMAN IN SUPPORT OF MOTION.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

CLARENCE O. GOKAY, JR., an infant, etc.,

Plaintiffs,

-against-

MARC ANTHONY'S INC., etc.,

Defendant.

74 Civ. 4577 (WCC)

- -X

State of New York,

County of New York, ss:

THOMAS R. NEWMAN, being duly sworn, deposes and says:

I am a member of the firm of Siff & Newman, P.C., appellate counsel for Bower & Gardner, attorneys for the defendant-appellant herein. I submit this affidavit in support of defendant's motion for an order pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure approving *nunc pro tunc* the filing of defendant's notice

REPLY AFFIDAVIT OF THOMAS R. NEWMAN IN SUPPORT OF MOTION

of appeal on July 14, 1976 from the judgment entered on July 11, 1976, and in reply to the affidavit of Joseph P. Napoli submitted in opposition thereto.

Mr. Napoli claims that defendant was guilty of laches in making its motion. This is not so.

For the past six years my late partner, Benjamin H. Siff, and I have been appellate counsel for the firm of Bower & Gardner handling virtually all of their appeals in both the state and federal courts. As such, I am the one who prepared the present motion and I am the one who would have moved earlier had I but known of the late filing prior to the conference before Mr. Fensterstock.

On Tuesday afternoon, August 17, Mr. Napoli telephoned Ms. Billauer, a young associate attorney with the firm of Bower & Gardner, and advised her of the late filing of the notice of appeal. Ms. Billauer checked into the matter the following morning and tried to reach me to advise me of the situation but was unable to do so until noon the following day. By then, the conference scheduled for Thursday morning at 10:00 a.m. had already taken place before Mr. Fensterstock. That explains why I did not make the motion previously.

I think it significant that although Mr. Napoli has known for several weeks that my office was handling the

appeal herein for Bower & Gardner, he never once mentioned his discovery of the late filing of the notice of appeal. Rather, a day and a half before the scheduled conference he telephoned a young, inexperienced attorney at Bower & Gardner, whom he knew to have nothing to do with the appeal, and told it to her.

The following incident is most significant for it illustrates how Mr. Napoli was waiting to spring his little surprise at the conference before Mr. Fensterstock.

On August 10, 1976 one of my associates, Steven Di Joseph, Esq., spoke to Mr. Napoli and discussed the portions of the record to be included in the appendix. During their telephone conversation Mr. Napoli told Mr. Di Joseph in cryptic fashion that he "had something interesting to tell him at the pre-argument conference which he (Di Joseph) would find amusing." Never once did Mr. Napoli give the slightest hint or suggestion that he had known for some time of defendant's late filing of the notice of appeal. A copy of Mr. Di Joseph's letter to Mr. Napoli following their telephone conversation on August 10, and plainly indicating that we were still totally in the dark about the defective filing, is attached hereto and made part hereof.

REPLY AFFIDAVIT OF THOMAS R. NEWMAN IN SUPPORT OF MOTION

Finally, the reason why the motion was not made in July when the notice of appeal was discovered and filed is that I was not aware that it had been filed three days late. When I had called the office of Bower & Gardner to inquire whether the notice of appeal had been served and filed, I was told that it had. I automatically assumed that this meant it had been done timely. Since the person filing the notice of appeal is not an appellate lawyer, he obviously did not appreciate the significance of filing it on the thirty-third day and therefore did not think to call it to my attention. That explains in full how we came to fall into the procedural trap so neatly prepared for us by Mr. Napoli and sprung with such evident delight after we had concluded our presentation on the merits before Mr. Fensterstock.

WHEREFORE, it is respectfully requested that defendant's motion to approve *nunc pro tunc* the filing of its notice of appeal on July 14, 1976 be granted.

THOMAS R. NEWMAN

Sworn to before me this
27th day of August, 1976,
BENJAMIN VINAR,
Notary Public, State of New York,
No. 41-9465875,
Qualified in Queens County,
Cert. filed in New York County
Commission Expires March 30, 1978.

LETTER, ANNEXED TO AFFIDAVIT OF THOMAS R. NEWMAN.

August 10, 1976

Joseph Napoli, Esq.
Lipsig, Napoli, Sullivan, Mollen & Kiapakis, P.C.
100 Church Street
New York, New York 10007

Re: Gokay v. Marc Anthony's Inc., etc.

Dear Mr. Napoli:

Enclosed herewith is a copy of the designation of parts of record to be included in appendix re the above matter. As indicated, I have included everything except the doctor's testimony which we agreed to omit.

The original has been filed this date in the United States Court of Appeals for the Second Circuit. Unless I hear from you to the contrary, on or before August 20th, I will assume that the proposed appendix meets with your approval.

Very truly yours,

SDJ/jdj
enclosure

ORDER APPEALED FROM.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

By J. Harrison
Deputy Clerk

Motion granted, in the interests of justice

So Ordered, August 27, 1976
New York, New York

William C. Conner
U.S.D.J.

Filed
U.S. District Court
August 27, 1976
S.D. of N.Y.

Copy rec'd by Hopsig etc.

4/8/76
cgm

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT: NEW YORK

----------x

CLARENCE O. GOKAY, JR., an infant,
by his mother, DOROTHY GOKAY, Individually,

Plaintiff,

74 Civ. 4577
(WCC)

-against-

NOTICE OF APPEAL

MARC ANTHONY'S INC., d/b/a/ MARC
ANTONIO'S RESTAURANT,

Defendant.

----------x

Notice is hereby given that the plaintiff above named hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment entered in this action on the 27th day of August, 1976 and from the whole thereof.

Dated: New York, N.Y.
September 23, 1976

LIPSIG, NAPOLI, SULLIVAN,
MOLLEN & LIAPAKIS, P.C.
Attorneys for Plaintiffs
100 Church Street
New York, New York 10007

TO: BOWER & GARDNER
Attorneys for Defendant
Office & P.O. Address
415 Madison Avenue
New York, N.Y. 10017

AMENDED NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT: NEW YORK

----------x

CLARENCE O. GOKAY, JR., an infant,
by his mother, DOROTHY GOKAY,
Individually,

Plaintiff,

74 Civ. 4577
(WCC)

-against-

AMENDED
NOTICE OF APPEAL

MARC ANTHONY'S INC., d/b/a
MARC ANTONIO'S RESTAURANT,

Defendant.

----------x

Notice is hereby given that the plaintiff above named hereby appeals to the United States Court of Appeals for the Second Circuit from the Order entered in this action on the 27th day of August, 1976 and from the whole thereof.

Dated: New York, N.Y.
September 23, 1976.

LIPSIG, NAPOLI, SULLIVAN,
MOLLEN & LIAPAKIS, P.C.
Attorneys for Plaintiffs
100 Church Street
New York, New York 10007

TO:

BOWER & GARDNER, ESQS.
Attorneys for Defendant
415 Madison Avenue
New York, New York 10017

751-2900

Service of three (3) copies of
the within APPENDIX is
hereby admitted this 20th day
of October, 1976

Bowen & Gardner
Attorney for Defendant Cippollone

by Jeffs Newman P.C.